Supreme Court, U.S.
FILED

05 1182 MAR 13 2006

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

In Re: The Trusts under the Will of Albert Pollak

PATRICIA POLLAK WEISS,

Petitioner,

v.

PHYLLIS POLLAK BERKETT, As the Successor Interim Trustee of the Trusts Under the Will of Albert Pollak, Deceased, and the Albert Pollak Inter Vivos Trusts,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

JONATHAN C. OSTER
OSTER MARTIN LLC
717 17th Street
Suite 1475
Denver, Colorado 80202-3315
(303) 382-1200

JOEL HIRSCHHORN
HIRSCHHORN & BIEBER, P.A.
2600 Douglas Road
PH One
Coral Gables, Florida 33134
(305) 445-5320

Co-Counsel for Respondent

PATRICIA POLLAK WEISS
Post Office Box 751
Sag Harbor Shopping Cove
Suite #12
Sag Harbor, New York 11963
(631) 725-4486

Attorney for Petitioner

(For Further Appearances See Reverse Side of Cover)

SUSAN E. DURRÉ
4675 Ponce de Leon Blvd.
Suite 302
Coral Gables, Florida 33146
(305) 666-8551

Co-Counsel for Respondent

MICHAEL A. DRIBIN
BROAD & CASSEL
201 S. Biscayne Blvd.
Miami Center Suite 3000
Miami, Florida 33131
(305) 373-9400

GAIL POLLAK BARIL
909 N. Roxbury Drive
Beverly Hills, California
90210
(310) 276-1114

CHARLIE CRIST
Attorney General of the
State of Florida
The Capitol PL-01
Tallahassee, Florida 32399-
1050
(850) 414-3300

QUESTIONS PRESENTED

Before the 1980 constitutional revision of article V of the Florida Constitution, the Florida Supreme Court had a broad constitutional power to entertain "conflict certiorari" petitions. The electorate voted to eliminate all "conflict certiorari" petitions which had previously afforded the Florida Supreme Court the opportunity to settle the law throughout the state. Since 1980, most appellate decisions which are in conflict with other decisions of the same appellate court are unreviewable by the Florida Supreme Court. Most decisions which 2 members of an appellate panel do not want the 7 member Florida Supreme Court to review are also unreviewable.

1. Has the revised Florida Constitution's elimination of all "conflict certiorari" jurisdiction before the Supreme Court of Florida violated the United States Constitution's imperative to provide Due Process and Equal Protection to appellants through the development and application of uniform state law, as required under Article XIV, Section 1?

2. Were Petitioner's constitutionally protected rights of Due Process and Equal Protection transgressed by Florida's failure to follow Florida's judge-made laws and treat Petitioner as other state litigants similarly situated by affording Petitioner an evidentiary hearing on her timely motions to vacate and reconsider a $1,676,377.73 "surcharge judgment" against her (for, *inter alia*, payment of over $300,000 in federal taxes owed by the trusts), where Petitioner had established a "colorable claim" for such relief in the motion papers and through Respondent's concession on appeal of at least $1,100,000.00 in admitted errors in the prior testimony of her expert accountant ?

LIST OF ALL PARTIES

The parties to the proceedings are:

Petitioner:
PATRICIA POLLAK WEISS

Respondent:
PHYLLIS POLLAK BERKETT

PATRICIA POLLAK WEISS is the daughter of PHYLLIS POLLAK BERKETT and Albert Pollak, Deceased.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Cited Authorities v

Table of Appendices iii

Opinions Below 1

Statement of Jurisdiction 2

Constitutional and Statutory Provisions Involved..... 3

Statement of the Case 4

Reasons For Granting the Writ 9

Point 1.
The revised Florida Constitution's elimination of all "conflict certiorari" jurisdiction before the Supreme Court of Florida has violated the United States Constitution's imperative to provide Due Process and Equal Protection to appellants through the development and application of uniform state law, as required under Article XIV, Section 1. 11

Point 2.
The Florida Supreme Court should be held to have both the inherent subject matter jurisdiction and the constitutionally imposed duty to review all federal constitutional questions and issues which concern its state court procedures for determining motions for relief from judgment and reconsideration in civil cases, by having a full opportunity to develop the appropriate legal standards that promote the constitutional imperative of statewide uniformity.... 22

Conclusion 28

Appendices ..... end

TABLE OF CITED AUTHORITIES

Cases

Armbruster v. Amber International Corp.,
416 So.2d 1220 (Fla. 3d DCA 1982)..... 23

Burkette v. Sharp, 752 So.2d 77 (Fla. 2d DCA 2000)..... 26

Casto v. Casto, 404 So.2d 1046, 1048 (Fla.1988)..... 26

Douglas v. People of the State of California, 372 U.S. 353,
83 S.Ct. 814, 9 L.Ed. 2d 811 (1963) 13

Dynasty Express Corp. v. Weiss, 675 So. 2d 235
(Fla. 4th DCA 1996)..... 27

Glatstein v. City of Miami, 391 So.2d 297
(Fla. 3d DCA 1980) ..... passim

Greene v. Massey, 384 So.2d 24 (Fla. 1980) 25

In Brunner Enterprises, Inc. v. Dept. of Revenue,
452 So.2d 550 (Fla. 1984)..... 25

In re Guardianship of Schiavo, 899 So.2d 340
(Fla. 2d DCA 2001)[Schiavo III]..... 26,27

Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) 22

Leo Goodwin Foundation, Inc. v. Riggs National Bank of
Washington, D.C., 374 So. 2d 1018 (4th DCA 1979)..... 25

Martinez v. Court of Appeal of California, Fourth
Appellate District, 528 U.S. 152, 120 S. Ct. 684,
145 L.Ed.2d 57 (2000) 12

Pruitt v. Brock, 437 So.2d 768 (Fla.1st DCA 1983)..... 26

Reaves v. State, 485 So.2d 829 (Fla. 1986) 22

Rodriguez v. U.S., 395 U.S. 327, 89 S.Ct. 1715,
23 L.Ed.2d 340 (1969) 13

Redwing Carriers, Inc. v. Watson, 341 So.2d 1049
(Fla. 4th DCA 1977) 22,23,26,27

Seven-Up Bottling Co. of Miami, Inc. v. George Constr.
Corp., 153 So.2d 11 (Fla. 3d DCA 1963) 23

Smith v. Smith, 903 So.2d 1044 (Fla. 5th DCA 2005) 27

Southern Bell Tel. & Tel. Co. v. Welden,
483 So. 487 (Fla. 1st DCA 1986)..... 27

State ex rel. Schwartz v. Lantz,
440 So.2d 446 (Fla.3d DCA 1983) 25

The Florida Star. v. B.D.F., 530 So.2d 286 (Fla. 1988)..14,16

Walker v. Walker, 401 So.2d 872 (Fla.2d DCA 1981)..... 25

Weiss v. Berkett, 785 So. 2d 1248 (Fla. 3DCA 2001) 1,4

Weiss v. Berkett, 827 So. 2d 383 (Fla. 3DCA 2002) 1

Weiss v. Berkett, 835 So. 2d 283 (Fla. 3DCA 2002) ... 1

Weiss v. Berkett, SC # 03-377 (2003) [order on motion]. 26

Weiss v. Berkett, 907 So.2d 1181 (Fla. 3DCA 2005)passim

Florida Constitutional Provisions and Statutes

Art. V, §3(b)(3) Fla. Const. (1980) ..... passim
Fla. Stat.§ 57.105 6,25
Fla. Stat. §59.041 28
Fla. Stat. § 737.307 3
Fla. Stat. § 737.402 ..... 3, 28

Constitutional Provisions

Amendment VIII ..... passim
Amendment XIV ..... passim

Federal Statutes and United States Supreme Court Rules

28 U.S.C. § 1257 (a) 2
28 U.S.C. § 2403 (b) 2
United States Supreme Court Rule 10 (c)..... 2
United States Supreme Court Rule 14.1 (e)(v)..... 2
United States Supreme Court Rule 29.4(c)..... 2

Florida Court Rules

Fla. R. App. P. 9.030(a)(2)(A)(iv) ..... passim
Fla. R. Civ. P. 1.540 ..... passim
Fla. R. Jud. Admin. 2.160(h) ..... passim

Other

CLE Material of The Florida Bar 2003,(Main Handbook), Florida Appellate Practice- Chapter 6 - Jurisdiction §6.54.(Susan L. Kelsey and Edna Caruso)..... 24
Fla. Jur. 2d §334 Judgments and Decrees 23
Padovano, Philip J. Florida Appellate Practice, 2006 ed. §3.10 16
Padovano, Philip J., Florida Civil Practice 2004-2005 ed., §13.8..... 28
West's 4 Florida Practice Series, Bruce J. Berman, Florida Civil Procedure, 2005 edition ¶540.5 [Rule 1.540 Relief From Judgment] 24

TABLE OF APPENDICES

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO VACATE SURCHARGE JUDGMENT AGAINST PATRICIA POLLAK WEISS dated February 2, 2004 ..... a-1

OPINION AND ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL dated and filed April 6, 2005 ..... a-3

ORDER OF THE SUPREME COURT OF FLORIDA dated and filed Tuesday, December 13, 2005 ..... a-10

ORDER GRANTING MOTION FOR SURCHARGE AGAINST PATRICIA POLLAK WEISS dated February 8, 2002 ....a-11

OPINION AND ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL dated and filed November 6, 2002 ..... a-15

ORDER OF THE SUPREME COURT OF FLORIDA dated and filed July 11, 2003 ..... a-15

ORDER OF THE SUPREME COURT OF FLORIDA dated and filed March 14, 2003 ..... a-16

ORDER OF THE SUPREME COURT OF FLORIDA dated and filed June 11, 2003 ..... a-17

WEISS v. BERKETT, 827 So. 2d 383 (Fla. 3d DCA 2002) dated and filed October 9, 2002 ..... a-18

WEISS v. BERKETT, 785 So.2d 1248(Fla. 3d DCA 2001) dated and filed June 6, 2001 ..... **a-19**

ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL DENYING REHEARING dated and filed August 17, 2005 ..... **a-21**

ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL dated and filed January 31, 2003 .....**a-22**

Amendment VIII **a-23**

Amendment XIV **a-23**

Florida Statute §737.307 Limitations on proceedings against trustees after beneficiary receives account. ... **a-23**

Florida Statute §737.402 Powers of trustees conferred by this part.–..... **.a-24**

Florida Statute 59.041 Harmless error; effect.....**a-24**

CONSTITUTIONAL ISSUES RAISED BELOW UNDER 8th AND 14th AMENDMENTS **a-25**

OPINIONS BELOW

Decisions Prior to Petitioner's Motions To Vacate and Reconsider Surcharge Judgment, and Partial Summary Judgment

The Florida Third District Court of Appeal's interlocutory opinion and order establishing Petitioner's delivery date of all trust records and requiring no further accounting is reported at 785 So. 2d 1248 (Fla. 3d DCA 2001). (Appendix a-19 -a-20). The Order Granting Motion For Surcharge Against Patricia Pollak Weiss (per Korvick, J.) (a-11 - a-14) is unpublished. The Florida Third District Court of Appeal's opinion and order granting Petitioner's petition for a writ of prohibition disqualifying Judge Korvick is published at 827 So. 2d 383(Fla. 3d DCA 2002) (a-18). The Florida Third District Court of Appeal's subsequent opinion affirming what it calls the "surcharge judgment" with a small downward modification deleting only the *prior* trustee's trustee fees (a-15) is published at 835 So. 2d 283 (Fla. 3d DCA 2002). The appellate court's order denying rehearing and certification (a-22) is unpublished. *See* 2003 Fla. App. LEXIS 2504 (Fla.. Dist.Ct. App. 3d Dist. Jan. 31, 2003). The Florida Supreme Court orders denying a stay of enforcement (a-16) and the motion for relinquishment of exclusive jurisdiction (a -17) are believed to be unpublished but appear on www.floridasupremecourt.org. The Florida Supreme Court's order denying discretionary review (a-15) is published at 851 So. 2d 730 (Fla. 2003). (The United States Supreme Court's denial of certiorari is published at 540 U.S. 1110, 124 S. Ct. 1078 (Mem.), 157 L.Ed.2d 898 (2004).

Decisions Concerning Petitioner's Motion To Vacate and Reconsider Surcharge Judgment, and Partial Summary Judgment

The short order denying Petitioner's motions to vacate and reconsider the disqualified judge's prior rulings

(a-1) is unpublished. The Florida Third District Court of Appeals's opinion affirming the denial of the motions, yet reducing the $1,676,377.73 amended surcharge judgment to $572,526.86 (a-3) is published at 907 So.2d 1181 (Fla. 3d 2005). The appellate court's order denying rehearing and certification, and Judge Cope's correction of his prior analysis, (a-21) is unpublished. The Florida Supreme Court's order denying discretionary review is published at 919 So.2d 437 (Table) (Fla. 2005) (a-10).

STATEMENT OF JURISDICTION

Florida's Third District Court of Appeal entered its opinion and order on April 6, 2005 and entered its order denying rehearing on August 17, 2005. Those orders were subject to discretionary review of the Supreme Court of Florida, which entered its order denying discretionary review on December 13, 2005. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a). Sup.Ct.R.10 (c) authorizes the petition because a state court decided important questions of federal law that have not been, but should be, settled by this Court, and/or decided federal questions in a way that conflicts with relevant decisions of this Court.

The notification required by Sup.Ct.R. 29.4(c) is being made in this initial court filing to alert the Attorney General of the State of Florida that 28 U.S.C. § 2403 (b) may apply and that he is being served with copies of this petition which contains this statement as Sup.Ct.R.14.1(e)(v) requires.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions of the United States Constitution are reprinted in the Appendix at a-23. These include the Due Process Clause, the Prohibition Against Excessive Fines Clause, the Privileges and Immunities Clause, and the Equal Protection Clause, which are included in the Fourteenth and Eighth Amendments.

Article V, Section 3(b)(3) of the Florida Constitution, as revised in 1980, replaced "conflict certiorari" jurisdiction with language providing in material part that the Florida Supreme Court "may review any decision of a district court of appeal.... that expressly and directly conflicts with the decision of another district court or of the supreme court ".

The relevant provisions of corresponding Fla.R.App.P. Rule 9.030(a)(2), which limited the "discretionary jurisdiction" of the Florida Supreme Court to certain decisions unless otherwise certified by another court, provides: "The discretionary jurisdiction of the supreme court may be sought to review (A) decisions of district courts of appeal that (i) expressly declare valid a state statute, (ii) expressly construe a provision of the state or federal constitution, (iii) expressly effect a class of constitutional or state officers; (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law:.."

The relevant portions of Fla. R. Civ. Pro. 1.540 are reproduced (a- 8) as part of the district court opinion.

The relevant portions of Fla. R. Jud. Admin. 2.160 (h) are reproduced (a- 7) as part of that same opinion.

The provisions of Fla. Stat. §737.307 ("Limitations on proceedings against trustee after beneficiary receives account"), Fla. Stat. §737.402 (2)(y) &(z) ("Powers of Trustees" to retain professionals) and Fla. Stat. §59.041 (Harmless error, effect") as are relevant to this petition are

reprinted in the Appendix at a-23 – a-24.

Significantly, Fla. Stat. §737.307, as in effect until 2003, states: "Unless previously barred by adjudication, consent or limitations, an action against a trustee for breach of trust is barred for any beneficiary who has received a final, annual, or periodic account **or other statement fully disclosing the matter** unless a proceeding to assert the claim is commenced within 6 months after receipt of the final, annual, or periodic account or statement...."(boldface added).

STATEMENT OF THE CASE

Petitioner PATRICIA POLLAK WEISS petitions for the United States Supreme Court to review the decision of the Florida Supreme Court which denied discretionary review of the order and opinion of the Florida Court of Appeal, Third District dated April 6, 2005. Petitioner requests that this Court also review the Florida Court of Appeal, Third District order and opinion that denied Petitioner's motions to reconsider and vacate the amended "surcharge judgment" without ever holding any evidentiary hearing as Petitioner had requested.

Petitioner is seeking to have this Court issue a writ of certiorari to the Supreme Court of Florida with instructions that it settle, articulate and establish the statutory and judge-made laws that are applicable to this case and then remand the case to the lower court with instructions that it conduct an evidentiary hearing on the factual issues that concern the surcharge judgment and the partial summary judgment awarded against Petitioner.

This case has a long history. The Third District Court of Appeal had initiated its review of the case in **Weiss v. Berkett, 785 So. 2d 1248 (Fla. 3d DCA 2001)** (a-19) when it reversed and remanded one of two counts and held that

Petitioner did not need to provide any further accountings to Berkett. Berkett later obtain a "surcharge judgment" of $1,693,181.73 against Petitioner, which was ordered by a lower court judge (Korvick, J.) who was later disqualified by the Third District Court of Appeal from hearing two of Petitioner's cases that were pending before her.

In Petitioner's first appeal, Berkett conceded that there were errors in that calculation and stated that the correct amount should have been $1,676,377.73. That reduction deleted all of the trustees fees paid to the Petitioner's predecessor trustee Coconut Grove Bank during the years it had served as trustee of various trusts but it did not eliminate any of the expenses and disbursements that Coconut Grove Bank had made during its years of service. It also did not eliminate any other fiduciary expenses that Petitioner had paid during her tenure as trustee, including over $300,000.00 in federal income tax that the trusts were required by federal law to pay to the federal government.

Petitioner's second appeal, which this Court is now being asked to review, is predicated upon Florida's handling of Petitioner's challenges to the judgments and order at the lower court for different reasons.

Under Florida law, Petitioner may file a motion for rehearing of prior decisions and orders whenever a judge has been disqualified to act. Fla. R. Jud. Admin. 2.160(h).(a-7) Petitioner filed such a motion after the mandate that stayed the case during the petition to the appellate court for prohibition and within 20 days of the date that the case was judicially reassigned to a successor judge.

Under Florida law, Petitioner may also file a motion for relief from judgment (a motion to vacate a judgment or order) and challenge that judgment or order in the context of the same case. Fla.R.Civ.P. 1.540(b). (a-8). If the reasons for the challenge are mistake, inadvertence, excusable neglect, or surprise, then such a motion must be filed within one year of

the date of entry of the orders sought to be reviewed. However, Florida has another law, Fla. Stat. §57.105 that authorizes monetary sanctions against a party who files any motion that is deemed frivolous because it is not supported by the facts, the law, or the subject matter jurisdiction necessary as a predicate for that motion. Under Florida judge-made law, in between the time that a notice of appeal and been filed and the record has been transmitted to the appellate court and the time that the mandate is received by the lower court, the lower court judge lacks all subject matter jurisdiction to entertain any motion effecting or modifying the judgment that forms the basis for the appeal. Therefore, the filing of a Fla. R.Civ.P. 1.540 motion for relief from judgment could expose a litigant to monetary sanctions. A litigant's rights to move the lower court for relief from judgment under Fla. R. Civ. P. 1.540 (b) "within one year", as written, are thus thwarted by Fla. Stat. §57.105 while an appeal is pending. The two laws are entirely in juxtaposition in instances where an appellate court considers cases for over a year before issuing its mandate.

This Catch-22 has been previously addressed by Florida's judge-made law, although it does not appear in any written statute or court rule. Petitioner relied upon judge-made law in the Third and Fourth Districts in order to bring Berkett's other mathematical miscalculations, errors and mistakes to the attention of the new judge who succeeded the disqualified judge. According to Florida appellate case law in the Third District and Fourth District and at least three scholarly treatises on the subject, *see* infra at p. 23-25, that one-year limitation is tolled on the day that an appellant moves the appellate court to "relinquish subject matter jurisdiction" so as to allow the lower tribunal to receive and determine a Fla. R. Civ. P. 1.540 motion for relief from judgment.

Under this judge-made law, Petitioner timely moved the appellate court for such an order of relinquishment of jurisdiction during the first appeal. See Weiss v. Berkett, 907 So.2d 1181 (Fla.3d DCA 2005), order on rehearing (a-21): "...COPE, C.J., specially concurs and states: On consideration of the motion for rehearing, it appears to me that the motion for relief from judgment under Florida Rule of Civil Procedure 1.540(b) was timely filed. See Glatstein v. City of Miami, 391 So.2d 297, 299 (Fla.3d DCA 1980)...."

The lower court denied Petitioner's motions for reconsideration and for relief for judgment and did not express any reasoning for the denial. (a-1) Under such circumstances, the appellate court assumed that the denial was due to the fact that the motions were untimely. (a-3). The appellate court did not reach the "merits" of the motions for reconsideration and relief from judgment. Instead, it focused only on computing the time when the motions should have been filed and found them to be tardy. Although every other Florida district court calculates the start date as the day that the order is entered and filed with the court clerk (by reference to the Clerk's date stamp), the Third District computed the time based upon the date appearing beside the judge's signature line and made its calculation from that date the order was "issued."

Although the appellate court should have expressly stated that Petitioner's motions had alleged a colorable claim for entitlement to relief from judgment (by then Berkett had conceded that her accounting expert had confessed his confused misunderstanding as to the questions that Berkett's lawyer posed to him at the initial trial/hearing, leading him to make additional errors totaling of over $1,100,000.00), the Third District Court of Appeal affirmed (a-3) with a reduction to $572,526.87 but nevertheless did not remand the case to the trial court for an evidentiary hearing, as every other Florida district court requires in their cases announcing

Florida judge-made law as to when such evidentiary hearings are required. *See infra* at p.26.

Petitioner's motion for rehearing, rehearing en banc and certification was denied.(a-21).

Petitioner's motion for discretionary review by the Florida Supreme Court was denied. (a- 10). The court website at www.floridasupremecourt.org shows that it was denied because the Florida Supreme Court lacked subject matter jurisdiction to exercise any discretionary review.

The Florida Supreme Court's ability to exercise any "discretionary jurisdiction" was precluded by the language that the Third District panel intentionally and deliberately selected to include in its 9 page opinion and the panel's decision to avoid any mention of any case which Petitioner had cited from any "other" district in Florida. As explained more fully in Point 1 below, the Florida Supreme Court now lacks "conflict certiorari" jurisdiction and its "discretionary jurisdiction" is entirely limited by the intermediate appellate court panel's expressed written opinion, rather than the parties' written arguments, the record itself and the conflicting case within the same district court as well as the other district courts within the State of Florida.

Petitioner raised the issue of her constitutional rights under the 8th and 14th Amendments throughout these proceedings at every opportunity. Some relevant portions and their locations appear in the Appendix (a-25).

The Florida courts ignored these legal arguments which concerned all of the constitutional rights in question.

The constitutional arguments concerning the Florida Supreme Court's denial of Petition's petition for discretionary review were not raised in that court as they could not have been raised because the issue had not yet arisen until the order denying discretionary review had issued. That order expressly stated that no motion for rehearing was permitted to be filed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, there is an important public interest in having the United States Supreme Court exercise its discretion to review Florida's revised Constitution and to determine whether a State's Constitution has been intentionally and deliberately amended by the electorate in a manner that has the effect of causing that State to do what it may not do under Article XIII and Article XIV, Section 1 of the United States Constitution: imposing excessive fines, depriving persons of liberty or property without due process of law, and denying persons within their jurisdiction the equal protection of the laws. When Florida intentionally and deliberately eliminated "certiorari conflict" jurisdiction 26 years ago in order to afford relief to the "burgeoning caseload" of its Florida Supreme Court judges, it did not replace it with any mechanism to ensure that Florida would have a statewide, predictable body of law that would be fairly applied throughout the state.

Because America's experiment with democracy depends upon the cooperation of all 50 states to fulfill the Due Process and Equal Protection mandates in Article XIV, § 1, as a country we cannot afford to have any one state, like Florida, continue with a system of appellate review that does not allow the Florida Supreme Court to develop and enforce a predictable body of law that is the same throughout the state. That is particularly important where all of its appellate courts have weighed in on issues and there is a divergence of opinion, whether it is overtly expressed or concretely demonstrated from the record below.

A fair state court system is not an option that Florida's penurious electorate can eschew. They must fund it with tax dollars to the extent that it is necessary to ensure statewide uniformity, as determined by the State's highest court which is charged with the duty to resolve all conflicts in

the law based upon the parties' arguments and the court records – not just those conflicts that any one lower appellate court might care to designate. Florida Supreme Court's "burgeoning case load" can be alleviated by less drastic alternatives such as increasing the number of judges on the bench in the supreme, lower and intermediate level appellate courts, increasing the number of law clerks in those courts so that well researched and well-articulated decisions can be issued statewide, and investing in efficient computer systems and the training programs to implement them.

And this United States Supreme Court should not permit a state's constitutional revisions to evade this Court's judicial review when such revisions concern the jurisdiction of the state's highest court to determine cases involving fundamental liberties. The State of Florida and its Supreme Court are in a quagmire due to a constitutional revision adopted by the Florida electorate. This is the only court that is higher than the Florida Supreme Court and therefore the only foreseeable method of returning Florida to the path of compliance with the United States Constitution.

Florida's present system promotes an opportunity for judicial activism in two ways that should be corrected. By operating in an environment that is virtually unchecked by Florida's highest court, the appellate courts have created an upside down system of justice that allows them to evade all judicial review unless the decisions demonstrate an express conflict. In addition, by allowing all appellate courts to avoid writing decisions that demonstrate an express conflict of law, too few civil cases have actually been capable of review by the Florida Supreme Court, and thus what was once a vibrant body of civil law has withered to the point that there are fewer and fewer civil decisions actually being issued by the Florida Supreme Court. Ad hoc decision-making and judicial activism in lower courts is capable of flourishing where there is no effective monitoring by the State's high court.

Second, the Florida Courts deliberately and intentionally disregarded the Due Process, Equal Protection, and Privileges and Immunities Clauses and the Eighth Amendment's prohibition against Excessive Fines as they concern this Petitioner by not settling, expressing and clarifying Florida statutory as well as judge-made law and then remanding the case down to the lower court so that an evidentiary hearing can be held where a colorable claim for relief from judgment had been shown. It should be clear from the record that where a party's expert witness accountant concedes to errors of over $1,100,000.00 in his testimony that initially calculated a "surcharge judgment" of over $1,600,000.00, there should be some opportunity for an evidentiary hearing that allows for some questioning before the trier of fact who has jurisdiction to reconsider and determine the motions challenging the initial and amended judgments

Point 1.
The revised Florida Constitution's elimination of all "conflict certiorari" jurisdiction before the Supreme Court of Florida has violated the United States Constitution's imperative to provide Due Process and Equal Protection to appellants through the development and application of uniform state law, as required under Article XIV, Section 1.

Article XIV of the United States Constitution states, *inter alia*, at Section 1:

> " ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The broad language of Article XIV, Section 1 necessarily encompasses certain constraints upon the arbitrary and discretionary conduct by each State in connection with its development and application of both (1) judge-made law — the rules that courts themselves establish to guide the law and are not promulgated by the legislative body – and (2) the scope and manner of judicial review that a state affords to litigants over which it has jurisdiction.

Examples of "judge-made law" include a State's doctrines of res judicata, collateral estoppel, judicial estoppel, law of the case and stare decisis. Other examples include the Economic Loss doctrine, the "right to privacy" and the scope thereof afforded to its citizens

This Court has held that no State is constitutionally required to establish an appellate court system to review lower court decisions, however if such an appellate court system is established then it must pass constitutional muster by affording Due Process and Equal Protection to litigants in a manner that is not arbitrary or discriminatory in any critical respect.

Martinez v. Court of Appeal of California, Fourth Appellate District, 528 U.S. 152, 159, 120 S. Ct. 684, 689-690, 145 L.Ed.2d 57 (2000) explains:

> "Appeals as of right in federal courts were nonexistent for the first century of our Nation, and appellate review of any sort was "rarely allowed". [ ] The States, also, did not recognize an appeal as of right until Washington became the first to constitutionalize the right explicitly in 1889 []. There was similarly no right to appeal in criminal cases at common law, and appellate review of any sort was "limited" and "rarely used." [cites omitted]. Footnote 7 of the opinion notes that "Although Washington was

> the first State to constitutionalize an appeal as of right, almost all of the States historically had some form of discretionary appellate review. See generally L. Orfield, Criminal Appeals in America, 215-231 (1939)"

Rodriguez v. U.S., 395 U.S. 327, 330, 89 S.Ct. 1715, 1717, 23 L.Ed.2d 340 (1969) states:

> "Those whose rights to appeal have been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings."

Douglas v. People of the State of California, 372 U.S. 353, 357-58, 83 S.Ct. 814, 816, 9 L.Ed. 2d 811 (1963) states:

> "When an indigent is forced to run the gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure.....In California, however, ... There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefits of counsel's examination into the record, research of the law, and marshaling arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself..."

Petitioner here argues that her constitutionally protected rights, as guaranteed under Article XIV, § 1, were transgressed by the State of Florida's courts, because of the conjoined effect of the arbitrary and discriminatory nature of Florida's Constitution, the court procedural rules that enforce it, the judge-made law, and its other state court rules. As a consequence, Petitioner was subjected to an enormous

surcharge judgment for her fiduciary disbursements (including payment of over $300,000.00 in federal taxes owed by the trusts) because Florida does not have an appeals process that compels a uniform statewide application of the same rules of law throughout the state. Petitioner further argues that she was denied her opportunity to have the surcharge judgment reexamined at an evidentiary hearing and vacated, following an appellate court's order that granted Petitioner's motion for disqualification of the judge who initially entered the surcharge judgment in connection with those trusts.

Petitioner seeks an order from this Court which remands the case to the Florida Supreme Court for an appellate review that requires Florida to settle its applicable judge-made rules in a manner that is consistent throughout the state and is neither arbitrary nor discriminatory against Petitioner merely because the lawsuit was filed in one particular appellate district court rather than another.

The Florida Supreme Court decision under review simply states that the Florida Supreme Court has "determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied." (a-10). The court's website, www.floridasupremecourt.org , however, shows the annotation that the petition was denied for lack of subject matter jurisdiction.

Florida's "discretionary review" jurisdiction is explained in The Florida Star v. B.D.F., 530 So.2d 286 (Fla. 1988): "in the broadest sense [it] has subject matter jurisdiction under article V, section 3(b)(3), of the Florida Constitution over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself."

Prior to 1980, the Florida Supreme Court had what was popularly known as "constitutional certiorari" jurisdiction. Since 1980, Florida has not allowed a litigant to

file a petition for a writ of certiorari in order to have the Florida Supreme court review an important question of state law and rules that has not been settled, but should be settled so that all Florida trial and appellate courts can apply the same law and rules fairly and equally to all litigants.

The Committee Notes to the corresponding Fla.R.App.P. 9.030 state:

> 1980 Amendment. Subdivision (a) of this rule has been extensively revised to reflect the constitutional modifications in the supreme court's jurisdiction as approved by the electorate on March 11, 1980. See art. V, §3(b), Fla. Const. (1980). The impetus for these modifications was a burgeoning caseload and the attendant need to make more efficient use of limited appellate resources. Consistent with this purpose, revised subdivision (a) limits the supreme court's appellate, discretionary, and original jurisdiction to cases that substantially affect the law of the state. The district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended article V.....

In other words, Florida's governmental interest in saving money was the reason for the elimination of the petition for writs of certiorari as a means of achieving equal protection of the law and due process of law. Apparently, 26 years ago, Floridians did not foresee that the Florida Supreme Court's "burgeoning caseload problem" could be eased by efficient use of evolving technological advancements. Apparently, Floridians also did not foresee that such a narrow contraction of its ability for appellate review would necessitate spending millions of dollars to support its

"burgeoning prison population", many of which inmates might have benefitted under the pre-1980 provision and were instead deprived of Florida Supreme Court review due to happenstance and fortuity rather than the actual merits of their cases.

In Florida Appellate Practice, 2006 ed., § 3.10, Florida appellate court judge Philip J. Padovano explains the Florida Supreme Court's limited "discretionary jurisdiction."

> **"§ 3.10 Express and direct conflict of decisions.**
>
> The Florida Supreme Court has the authority as the highest court of the state to resolve legal conflicts created by the district courts of appeal. Article V, section 3(b)(3) of the Florida Constitution enables the supreme court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.
>
> In *The Florida Star v. B.D.F.*, the supreme court concluded that article V, section 3(b) creates and defines two separate concepts. The court explained that the first of these concepts "is a general grant of discretionary subject matter jurisdiction, and the second is a constitutional command as to how the discretion itself may be exercised. Although the supreme court may chose not to exercise discretionary jurisdiction to review a decision of a district court of appeal under section 3(b)(3) in a given case, that jurisdiction exists, at least potentially, until such time as the court issues its order denying review. Whether the supreme court has

discretionary jurisdiction is an entirely different issue.

Before the 1980 constitutional revision of article V, the Florida Supreme Court had a broad constitutional power to entertain "conflict certiorari" petitions. The 1980 revision deleted all references to the term "certiorari' and severely restricted the class of district court of appeals decisions that could be reviewable by the supreme court on the basis of a conflict. Thus, the supreme court no longer has jurisdiction to issue writs of certiorari and the court's discretionary jurisdiction to review district court of appeal decisions is focused more on the power to resolve decisional conflicts in the body of the law.

The supreme court has discretionary jurisdiction only if the decision of the district court expressly conflicts with a decision of the supreme court or another district court of appeal. It is not enough to show that the district court decision is effectively in conflict with other appellate decisions. By definition, the term "expressly" requires some written representation or expression of the legal grounds supporting the decision under review. While it is not necessary that the district court of appeal explicitly identify a conflicting appellate opinion in its order, the district court must at least address the legal principles applied as a basis for the decision.

A decision of the district court of appeal is no longer reviewable on the ground that an examination of the record would

show that it is in conflict with another appellate decision; it is only reviewable if the conflict can be demonstrated from the district court of appeal's opinion. Thus, the supreme court may not employ conflict jurisdiction as a basis to review a per curiam affirmance that is unsupported by a written opinion. Likewise, the supreme court lacks jurisdiction to review a district court decision denying a petition for extraordinary relief without opinion. Review of a decision without an opinion is unavailable even if there is a written dissent, because a dissent is not a "decision" upon which a conflict could be based. A party cannot circumvent the rule against reviewing a per curiam decision without an opinion by invoking the supreme court's jurisdiction to issue extraordinary writs.

A per curiam decision that merely cites a controlling precedent does not expressly conflict with another appellate decision even if a conflict could be demonstrated from the cited precedent. This kind of decision, sometimes referred to as a "citation PCA," is unreviewable even if the cited precedent was decided contemporaneously with the decision sought to be reviewed. There are two exceptions. The first is that a citation PCA is reviewable if the case cited as a precedent has been reversed. The second is that a citation PCA is reviewable if the case cited as precedent is pending review; that is, if the supreme court has accepted the cited case for discretionary review. In either of these

situations, the supreme court has discretionary jurisdiction to accept review of the per curiam decision controlled by the cited authority.

The supreme court must look to the opinion of the district court to determine whether the decision is in conflict and the opinion must be a majority opinion on the point of law that is the subject of the alleged conflict. Discretionary jurisdiction cannot be based on a conflict existing in a plurality opinion on an en banc hearing or rehearing because the opinion is not the decision of the court. For the same reason, it seems unlikely that conflict could be based on an opinion of one judge in a three-judge panel if one other judge merely concurred in the result of the case. However, the supreme court has held that it has jurisdiction based on a conflict in a panel decision even if the panel decision is later rejected in an en banc decision of the district court of appeal.

The supreme court has not resolved the issue whether a conflict in the dicta of a district court of appeal can serve as a basis for discretionary review. The use of the term "expressly" placed a premium on the contents of an appellate decision, but article V, section 3(b)(3) establishes jurisdiction on the basis of conflicting decisions. Thus, in a literal sense dicta conflict cannot exist.

Discretionary jurisdiction to resolve conflicts is limited to those cases in which the decision of the district court of appeal expressly and directly conflicts with a decision of the supreme court or of another district

court of appeal. Intradistrict conflicts are now addressed by the rehearing en banc procedure and not as they formerly were by conflict certiorari. The subject of rehearings en banc is addressed in section 19.7." [all footnotes omitted]"

Footnote 3 to the foregoing passage explains: "**Earlier Provision**. Article V, section 3(b)(3), Florida Constitution (1972) allowed the supreme court to review "by certiorari any decision of a district court of appeal ... that is in direct conflict with a decision of any district court of appeal on the same question of law."

Footnote 4 to the foregoing passage explains: "**1980 Revision**. As noted in the official comments to rule 9.030(a)(2)(iv), the restrictions of the supreme court's discretionary jurisdiction to review conflicting decisions was the most radical change made in the 1980 revision of Article V."

Thus, ever since the 1980 revision, a typical Florida appellant will never have the opportunity to file a merits brief before the Florida Supreme Court where the district court's opinion is phrased so that it does not contain any conflicting cases in "other" district courts and instead contains language that merely expressly and directly conflicts with that "same" district's prior precedent. In such a situation, the only guaranteed opportunity for further appellate review is to request rehearing, or rehearing en banc by all of the district judges in the "same" courthouse. Thus, Article V, §3(b)(3) unconstitutionally establishes two distinct classes of losing appellants regardless of the merits of the case and, in turn, transgresses the Due Process and Equal Protection Clauses.

Furthermore, under Article V, Section 3(b)(3), the panel which writes the intermediate appellate court opinion becomes the unchecked and unmonitored "gatekeeper" for

the doors to the state's highest court, by its deliberate selection of words, and intentional refrain from other words and cases, so as to shape the opinion. Any further advocacy concerning the parties' briefs and the record do not provide a basis for Florida Supreme Court jurisdiction. By deliberately not mentioning any case from "another" district court, any 2 members of a district court panel can thwart the review by 7 Florida Supreme Court justices who should be "higher", even if the identical fact situation could advance to the Supreme Court if a different panel wrote a different decision mentioning those other cases that were argued in the briefs. Thus, criminal defendants in one district could have the opportunity for a Florida Supreme Court review if an opinion in another district compares and contrasts the relevant case law, whereas criminal defendants convicted of identical crimes are deprived of any further by the Supreme Court if the written decisions are only a "PCA" or a "citation PCA", notwithstanding the underlying merits of the cases.

Thus, the 1980 revision gives Florida's intermediate judges a "pocket veto" by which they can entirely preclude the development of a uniform law, and its application, throughout the state. These practices are not only tragically unfair to both civil and criminal appellants, they are blatantly repugnant to Article XIV, § 1 of the United States Constitution. Florida's revised Article V, §3(b)(3), as enacted and as applied through Florida's Fla.R.App.P. 9.030, has dramatically delayed and entirely eliminated the possibility of statewide uniform application of a coherent body of state law insofar as judge-made law and judicial interpretations of statutes and rules. These practices in Florida have eroded any cohesive body of state law, by eviscerating any application of the Due Process and Equal Protection Clauses of the United States Constitution.

While the 2002 amendment to Fla.R.App.P. 9.330(a) now permits a litigant to request an opinion that is more than

a PCA citation, that language does not address the 1980 revision's inherent flaws, which have essentially designated the losing appellant's panel to pre-screen the worthiness of his or her appeal to the Florida Supreme Court.

Although writs of certiorari to the Florida Supreme Court have been eliminated and replaced by new constitutional provisions that focus solely upon an "express" and "direct" conflict with a decision in another district court of appeal elsewhere in the state, Florida has struggled to find true meaning in those terms over the last quarter century. The Florida Supreme Court has held that "[a]n express and direct conflict cannot be shown from a dissenting opinion. Reaves v. State, 485 So.2d 829 (Fla. 1986); Jenkins v. State, 385 So.2d 1356 (Fla. 1980). So, even though Judge Cope ultimately agreed with Petitioner that the Third District's Glatstein v. City of Miami, 391 So.2d 297 (Fla.3d DCA 1980) meant that Petitioner's Fla.R.Civ.P. 1.540 motion for relief from judgment was timely filed because of the judge-made law in Glatstein that tolls the one-year period when a motion for relinquishment of jurisdiction is filed at the appellate court, there was no hope of Petitioner obtaining review by the Florida Supreme Court because 2 members of the panel did not cite to both Glatstein and Redwing Carriers, Inc. v. Watson, 141 So. 2d 1049 (Fla. 4th DCA 1977).

Point 2.

The Florida Supreme Court should be held to have both the inherent subject matter jurisdiction and the constitutionally imposed duty to review all federal constitutional questions and issues which concern its state court procedures for determining motions for relief from judgment and reconsideration in civil cases, by having a full opportunity to develop the appropriate legal standards that promote the constitutional imperative of statewide uniformity.

Now, after its 26 year hiatus from "constitutional certiorari", the Florida Supreme Court should resume its duty to resolve conflicts and settle the law of the state in a variety of civil issues, which have effected this case. After a quarter century of only having a opportunity to rule upon the few cases which the appellate courts decided to make available for review by their selection of language within "the four corners" of their decisions, the Florida Supreme Court should settle conflicts that are brought directly to them by the parties themselves, not just through other judges after pre-screening.

As explained in Petitioner's jurisdictional brief filed with the Florida Supreme Court, here are some of the issues that need to be resolved by Florida's Supreme Court as a first step:

1. The Decision relied upon Seven-Up Bottling Co. of Miami, Inc. v. George Constr. Corp., 153 So.2d 11 (Fla. 3d DCA 1963) and ignored the "tolling rule" first announced by the Fourth District in Redwing and later adopted by the Third District in Glatstein. Petitioner's Rule 1.540 motion was timely filed because she had *also* filed a motion for relinquishment of the Third District's exclusive jurisdiction on February 3, 2003 and she did that within 1-year of the orders' "entry" dates, following Redwing. See also Armbruster v. Amber International Corp., 416 So.2d 1220 (Fla. 3d DCA 1982).

Fla. Jur. 2d §334 Judgments and Decrees states:

Time for filing motion - tolling of limitation period for filing motion.

Illustration

An appeal that was dismissed as untimely filed does not toll the time for filing a motion for relief from judgment. **The time limitation may be tolled, however, by the filing in the appellate court of a motion to remand the**

> **cause to the trial court for its consideration of a motion for relief**. [citing Glatstein] The service of a motion for rehearing within the time limitations set by the Rules of Civil Procedure also tolls the one-year time period until such time as the motion for rehearing has been disposed of by the trial court. [boldface added]

West's 4 Florida Practice Series, Bruce J. Berman, Florida Civil Procedure, 2005 edition, also recognizes "tolling" when a motion for relinquishment of jurisdiction is filed with the appellate court, cites to Glatstein as precedent, and explains under ¶540.5 [Rule 1.540 Relief From Judgment] at p. 683:

> "*The Tolling of the One-Year Limitation Period.* The one-year limitation for seeking relief under (b)(1), (2) and (3), is not tolled by the filing of an appeal.....The one year time period does not begin to run until after the trial court loses jurisdiction over the matter either at the expiration of the time to seek relief under Rule 1.530 or or, if relief is sought, upon disposition of the motion. The test is whether the judicial labor is at an end. In addition, a motion to relinquish jurisdiction filed with the appellate court after a judgment has been appealed, even if denied by the appellate court tolls the one-year time limitation."

Significantly, Petitioner followed the procedural protocol that is recommended by the Florida Bar. CLE Material of The Florida Bar 2003,(Main Handbook), Florida Appellate Practice- Chapter 6 - Jurisdiction, by Susan L. Kelsey and Edna Caruso, identifies special circumstances at

§6.54 and instructs the Bar what to do:

> "Even though a motion for relief from judgment under Fla. R. Civ.P. 1.540 is a collateral proceeding, the trial court has no authority to grant relief while an appeal from the original judgment is pending. Glatstein v. City of Miami, 391 So.2d 297 (Fla. 3d DCA 1980). This can present a problem. Several forms of relief under Rule 1.540 have a one-year statute of limitation. The mere filing of an appeal from the original judgment does not toll this statute of limitation period. Thus, the limitation period may expire while the appeal remains pending. The best solution appears to be to move the appellate court to relinquish jurisdiction to permit the trial court to consider the Rule 1.540 motion. The motion for relinquishment of jurisdiction will toll the one-year statute of limitation even if the motion is denied. [citing Glatstein] ."

The Third District's Decision ignored that Petitioner would be subject to sanctions under Fla. Stat.§ 57.105 (1999) by filing a Rule 1.540 motion in the lower tribunal when it still lacked subject matter jurisdiction to hear it. See State ex rel. Schwartz v. Lantz, 440 So.2d 446 (Fla.3d DCA 1983) in footnote 3 (trial court lacks jurisdiction to entertain a 1.540 motion while appeal is pending), citing Walker v. Walker, 401 So.2d 872 (Fla.2d DCA 1981). Thus, it conflicts with Lantz, Walker and Leo Goodwin Foundation, Inc. v. Riggs National Bank of Washington, D.C., 374 So. 2d 1018 (4th DCA 1979) and the Florida Supreme Court's jurisdictional rules in In Brunner Enterprises, Inc. v. Dept. of Revenue, 452 So.2d 550 (Fla. 1984) and Greene v. Massey, 384 So.2d 24 (Fla. 1980)

2. The District Court's decision misinterpreted the Florida Supreme Court's decision in Casto v. Casto, 404 So.2d 1046, 1048 (Fla. 1988) and other district courts of appeal decisions which would start the 1-year clock on the date of "entry of judgment" which is when it is recorded (i.e., date of "rendition") rather than the earlier date which is recited next to the judge's signature.

The Decision misconstrues the language "entered or taken" to mean the same thing as "granted or issued", establishing conflicts with (1) Casto v. Casto, 404 So.2d 104, 1048 (Fla. 1981) (defining "entry of judgment" to mean "the recording of the judgment – the spreading of the judgment upon the court's official records."), (2) Pruitt v. Brock, 437 So.2d 768 (Fla.1st DCA 1983) (date of commencement of the 1-year period cannot be a date before the order's "rendition.") and (3) Burkette v. Sharp, 752 So.2d 77 (Fla. 2d DCA 2000) (equating rendition with filing, not signing.)

3. The District Court's decision expressly and directly conflicts with the Florida Supreme Court's June 11, 2003 decision on a motion in Weiss v. Berkett SC#03-377, which held "the circuit court has jurisdiction to proceed" to entertain and determine WEISS' "anticipated" motion founded upon Fla. R. Civ.P. 1.540 Motion For Relief From Judgment and her pending Fla. Judicial Administration Rule 2.160(h) motion.

The language in the Florida Supreme Court's June 11, 2003 order (a-17) appears to Petitioner to reflect that it adopted the rationale of Redwing and Glatstein and determined that an "anticipated" Rule 1.540 motion would be timely, based on the procedural history.

4. The District Court's decision expressly and directly conflicts with In re Guardianship of Schiavo, 899 So.2d 340 (Fla. 2d DCA 2001) ["Schiavo III"] by not reversing and remanding to afford Petitioner an opportunity for an evidentiary hearing on her colorable claim for relief from

judgment, because Petitioner's Rule 1.540 motion was timely when correctly calculated under the Redwing/Glatstein "tolling" rules and the panel's affirmance did not address the "merits" of Petitioner's motion based upon "legally sufficient evidence" after an "evidentiary hearing".

A motion for relief from judgment should not be summarily dismissed without any evidentiary hearing unless it fails to allege a colorable entitlement to relief. See In re Guardianship of Schiavo, 800 So. 2d 640 (Fla. 2d DCA 2001). Schiavo cited Dynasty Express Corp. v. Weiss, 675 So. 2d 235, 239 (Fla. 4th DCA 1996) and Southern Bell Tel. & Tel. Co. v. Welden, 483 So. 487, 489 (Fla. 1st DCA 1986). See also Smith v. Smith, 903 So.2d 1044 (Fla.5th DCA 2005).

These cases demonstrate that Petitioner would have been entitled to an evidentiary hearing on her motion to vacate in every "other" district court and yet the Third District opinion evaded judicial review under Florida's revised Constitution because it failed to mention the that conflict within the "four corners" of the opinion that it wrote. Surely, the panel members were family with the Schiavo case, which garnered a great deal of media attention in the last year. Yet, it was not even mentioned in the opinion, despite the issue having been raised in the briefs.

5. The Florida Supreme Court needs to consider the procedures that implement reconsideration of a motion that was decided by a disqualified judge under Fla. Const. 38.10 and the various factors to take into consideration for a demonstration of "good cause" for permissible judicial extension of the "20 day" period set forth in Fla. R. Jud. Admin. 2.160(h) when the mandate has not yet issued, when the case in still stayed because of that, and when the judge who has been disqualified by the appellate court is also the administrative judge and has delayed reassigning the case to her successor judge.

See also Philip J. Padovano, Florida Civil Practice 2004-2005 ed. at §13.8 fn.20.

6. In the context of an "surcharge judgment", the Florida Supreme Court needs to consider the arguments that Petitioner raised concerning Fla. Stat. §737.307 Limitations on proceedings against trustees after beneficiary receives account, Fla. Stat. §737.402 Powers of trustees conferred by this part, and Fla. Stat.§737.402(y) & (z) as they concern the right of court-appointed trustee to hire professional accountants and attorneys. The Florida Supreme Court should also consider that Fla. Stat.§59.041, Florida's harmless error rule in civil cases, may not be the appropriate standard of appellate review when the issue concerns whether a court-imposed "surcharge" constitutes an unconstitutional Excessive Fine under the Eighth Amendment, and therefore requires the standard of review to be that used for criminal cases, thus shifting the burden of proof away from Petitioner in the context of an appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
Patricia Pollak Weiss
Attorney for Petitioner
Post Office Box 751
Sag Harbor Shopping Cove Suite #12
Sag Harbor, New York 11963
(631) 725-4486

March 13, 2006

APPENDIX

APPENDICES

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO VACATE SURCHARGE JUDGMENT AGAINST PATRICIA POLLAK WEISS dated February 2, 2004

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
PROBATE DIVISION
FILE NO. 91 5413 (02) ROTHENBERG

In Re: The Trusts under the Will of Albert Pollack (sic), Deceased
PHYLLIS POLLAK BERKETT,
Plaintiff/Petitioner
vs.
PATRICIA POLLAK WEISS,
Defendant/Respondent
_____/

ORDER OF COURT

THIS CAUSE having come before this court on Patricia Pollak Weiss' MOTION FOR RECONSIDERATION PURSUANT TO FLA. STAT. 38.10 AND RULE 2.160 (h) OF THE JUDICIAL ADMINISTRATIVE RULES AND MEMORANDUM OF LAW IN SUPPORT and Patricia Pollack (sic) Weiss' MOTION TO VACATE SURCHARGE JUDGMENT AND ORDER GRANTING (MOTION FOR) PARTIAL SUMMARY (sic) AGAINST PATRICIA POLLAK WEISS PURSUANT TO FLA. R. CIV.P. 1.540 AND MEMORANDUM OF LAW IN SUPPORT, in the above styled cause, and the Court after hearing argument of counsel and being otherwise fully advised in the Premises,

"**ORDERS** and **ADJUDGES** as follows:

1. The above stated Motion For Reconsideration, be and the same is, hereby Denied.

2. The above state [sic] Motion To Vacate, be and the same, is hereby Denied."

DONE and **ORDERED** on this 2nd day of February, 2004, in Chambers at Miami-Dade County, Florida.

/s/

ARTHUR ROTHENBERG
Probate Judge

Copies furnished to:
Joel Hirschhorn, Esquire
Patricia Pollak Weiss, Pro Se

OPINION AND ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL dated and filed April 6, 2005

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 2005

PATRICIA POLLAK WEISS, **
Appellant, ** CASE NOS. 3D04-391
vs. 3D03-2652

PHYLLIS POLLAK BERKETT, etc. ** Lower Tribunal
Appellee, ** Case Nos. 91-5143

92-4412

Opinion filed April 6, 2005

An appeal from the Circuit Court of Miami-Dade County, Arthur Rothenberg, Judge

Patricia Pollak Weiss, in proper person

Hirschhorn & Bieber and Joel Hirschhorn, for appellees

Before COPE, GREEN and SHEPHERD, J.J.

PER CURIAM.

GREEN, J.

The appellant, Patricia Pollak Weiss, appeals from an order denying both her "Motion for Reconsideration pursuant to Fla. Stat. 38.10 and Rule 2.160(h) of the Judicial Administration Rules" and her "Motion to Vacate Surcharge judgment and Order Granting (Motion for) Partial Summary Judgment against Patricia Pollak Weiss pursuant to Fla. R. Civ. P. 1.540." For the following reasons, we affirm.

The history of this case is considerable. Berkett, the successor interim trustee, brought an adversary proceeding in probate against the appellant, Weiss, a former trustee. Berkett's actions sought an accounting and a surcharge. Weiss counterclaimed alleging Berkett breached an indemnification agreement (Counts ! & II), a fiduciary duty (Count III), committed fraud (Count IV) and breach of trust (Count V). A trial was held on September 20-21, 2000, and October 15, 2001. On November 8, 2001, the trial court granted Berkett's motion for partial summary judgment on Counts, I, II, IV and V of Weiss's counterclaim. On February 8, 2002, the trial court granted the motion for surcharge against Weiss, and awarded BERKETT $1,693,181.73.

Weiss appealed the order granting surcharge. The court affirmed Berkett's concession of error with regard to the amount of the surcharge. Weiss v. Berkett, 835 So. 2d 283 (Fla. 3d DA 2002). Specifically, we held:

> [a]fter a thorough review of the record and the applicable law, we find no reversible error in the proceedings below. We do, however, accept appellee's concession of error with regard to the computation of the amount surcharged and remand for the sole purpose of correcting the judgment to reflect the amount of surcharge as $1,676,377.73.
> Id. (emphasis added).

Before we released our opinion, Weiss filed a motion for disqualification of the trial judge. On April 17, 2002, this Court granted Weiss' petition for a writ of prohibition upon our determination that the verified motion for disqualification was legally sufficient and timely. In re Pollack, 816 So.2d

1142 (Fla. 3d DCA 2002).[Footnote 1] The trial judge recused herself on October 23, 2002.

On December 2, 2002, Weiss filed, in the trial court, a motion for reconsideration of the prior rulings on the recused judge pursuant to Florida Rule of Judicial Administration 1.160(h).[Footnote 2] On March 12, 2003, Weiss filed a motion to vacate the surcharge judgment and the partial summary judgment pursuant to Florida Rule of Civil Procedure 1.540(b). [Footnote 3] These motions asked the successor trial court

Judge to reconsider the partial summary judgment and the surcharge entered against Weiss. The court informed the parties that the motions would be considered without an evidentiary hearing.

On September 3, 2003, the trial court, pursuant to this court's mandate, reduced the amount of the surcharge to $1,676,377.73, and entered an amended surcharge judgment. Ultimately, the trial court also denied Weiss's motions for reconsideration and to vacate. Weiss's appeal from this denial is the order under review before us now.

We find that the trial court properly denied both of Weiss' motions as they were untimely filed. Rule 2.160(h) provides that prior rulings of a disqualified judge may be reconsidered and vacated (or amended) by a successor judge if a motion for reconsideration is filed within twenty (20) days of the order of disqualification. Here, the trial judge recused herself on October 23, 2002, and the motion for reconsideration was not filed until December 2, 2002. This is well beyond the acceptable time prescribed by the Rule.

Similarly, the orders granting Berkett entitlement to a surcharge and partial summary judgment were issued February 8, 2002, and November 8, 2001, respectively. The motion to vacate was filed, by Weiss, March 12, 2003, clearly beyond the one-year limitation period prescribed by

rule 1.540. The mere fact that an appeal was taken from the judgment did not toll this one-year time frame. See Seven-Up Bottling Co. of Miami, Inc. v. George Constr. Corp., 153 So. 2d 11, 12-13 (Fla. DCA 1963) (holding that the filing of an appeal does not toll one-year limitation for filing motion to vacate judgment). Accordingly, we affirm the denial of Weiss's motions.

However, based on Berkett's counsel's generous concession of error at oral argument, we remand this case to the trial court for the sole purpose of reducing the amount of the surcharge judgment to Berkett's concession of $572,526.87.

Affirmed and remanded with directions.

COPE, J. concurs.

SHEPHERD, J. (concurring in part and dissenting in part).

I agree in all respects with the analysis and conclusion of my esteemed colleagues that the denial of the motions under review must be affirmed on appeal. However, I respectfully disagree with the reduction of the surcharge to $572,526.87.

This is Weiss' fifteenth appearance before us - thirteen pro se - in approximately twenty-five years [Footnote 4] concerning two trusts created by her father, Albert Pollak, who passed away in 1962, leaving considerable assets for the benefit of his widow, the Appellee here, and their four children, including Appellant. Being a good businessman, Mr. Pollak chose two well-respected lawyers and community leaders, Arthur and Jack Courshon, as the trustees of the trusts. In 1983, the Courshons were replaced by Coconut Grove Bank, and one year later, by Appellant Weiss herself, who by then had obtained a law degree [Footnote 5] and was in no small part the instigator of the second, if not the first, change.

When Appellant Weiss replaced the bank in 1984 as trustee, there was the then tidy sum of $1,250,000 in the trusts. By the time that Weiss was forced to resign on December 30, 1989, there was only $8,700 left. Weiss had mismanaged, plundered [Footnote 6] and litigated into bankruptcy the assets left by Albert for the future of his widow and children. Hence, the enormous surcharge judgment.

From all that can be gathered on the record before us, the request for a further reduction of the surcharge is being made by Appellee in a last bid to buy peace with her daughter, Patricia. [Footnote 7] If Patricia's 25 year history of disrespect for her mother and siblings as briefly chronicled here is any indicator, I have my doubts about whether implementation of counsel's offer will foster the mother's desire; but in the refrain of a popular lyric from the past, "that is not for me to say." A full affirmance is what is legally required, and I would so rule. In my opinion, the interpersonal issues between family members are for another forum.

Footnotes:

1. In a separate but related case, Weiss also moved for disqualification of the trial judge. We held this motion for disqualification should have been granted. Weiss v. Berkett, 827 So. 2d 383 (Fla. 3d DCA 2002).

2. This Rule provides in pertinent part:

(h) Prior Rulings. Prior factual or legal rulings by a disqualified judge may be reconsidered and vacated or amended by a successor judge based upon a motion for reconsideration, which must be filed within 20 days of the order or disqualification, unless good caus is shown for a delay in moving for reconsideration or other grounds for reconsideration exist.

3. This Rule provides in pertinent part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud;, etc.
On motion and upon such terms as are just, the court may relieve a party of (sic) a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the judgment or decree is void; or (5) that the judgment or decree has been satisfied, released or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order or proceeding was entered or taken. A motion under this subdivision does not effect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

4. See Weiss v. Courshon, 522 So.2d 401 (Fla. 3d DCA 1987); Weiss v Courshon, 541 So.2d 1352 (Fla. 3d DCA 1989); Weiss v. Trust Under Will of Albert Pollak, 595 So. 2d 1035 (Fla. 3d DCA 1992); Weiss v. Berkett, 600 So.2d 1121 (Fla. 3d DCA 1992); Weiss v. Courshon, 618 So.2d 255 (Fla. 3d DCA 1993); Weiss v. Courshon, 627 So. 2d 604 (Fla. 3d DCA 1993); Weiss v. Courshon, 768 So. 2d 2 (Fla. 3d DCA 2000); Weiss v. Berkett, 785 So.2d 1248 (Fla. 3d DCA 2001); In re Pollak, 816 So.2d 1142 (Fla. 3d DCA

2002); Weiss v. Berkett, 827 So. 2d 383 (Fla. 3d DCA 2002; Weiss v. Berkett, 835 So.2d 283 (Fla. 3d DCA 2002), *reh'g denied en banc* (Jan. 21, 2003); *rev. denied*, 851 So.2d 730 (Fla. 3d DCA 2003), *cert. denied*, 124 S. Ct. 2004); Weiss v. Berkett, 831 So. 2d 194 (Fla. 3d DCA 2002); Pollak v. Berkett, 845 So.2d 204 (Fla.3d 2003. Weiss v. Berkett, 883 So.2d 299 (Fla. 3d DCA 2004), and Weiss v. Berkett, Case No. 3403-2652, which was consolidated with this case (Weiss v. Berkett, Case No. 3D04-391).

5. Appellant is a member of the State Bar of New York.

6. In 1986 alone, Weiss took $354,364.47 from the trusts for her own personal benefit. During the five years that she was trustee of the trusts, she also paid herself tens of thousands of dollars in trustees' fees without authorization, and used trust assets to purchase numerous items for herself.

7. Appellee has advised us that the mother has to date not sought to execute against her daughter in the surcharge.

ORDER OF THE SUPREME COURT OF FLORIDA
dated and filed Tuesday, December 13, 2005

SUPREME COURT OF THE STATE OF FLORIDA
CASE No. SC05-1722
Lower Tribunal Nos. 3D04-391
3D04-2652

PATRICIA POLLAK WEISS, Petitioner(s)
vs.
PHYLLIS POLLAK BERKETT, etc., et al, Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

WELLS, ANSTEAD, LEWIS, QUINCE and CANTERO, JJ., concur.

A True Copy
Test:
/s/
Thomas D. Hall
Clerk, Supreme Court

ORDER GRANTING MOTION FOR SURCHARGE AGAINST PATRICIA POLLAK WEISS dated February 8, 2002

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
PROBATE DIVISION
FILE NO. 92-4412(Div.03)

In Re: The Trusts under the Will of Albert Pollak

PHYLLIS POLLAK BERKETT,
As the Successor Interim Trustee of the
Trusts Under the Will of Albert Pollak, Deceased,
and the Albert Pollak Inter Vivos Trusts
Plaintiff/Counter Defendant

vs.

PATRICIA POLLAK WEISS,
Defendant/CounterPlaintiff.

_____/

ORDER GRANTING MOTION FOR SURCHARGE AGAINST PATRICIA POLLAK WEISS

THIS CAUSE came on for hearing on September 20, 2000 and October 15, 2001 on Phyllis Pollak Berkett's Amended Complaint (Petition) for Statements of Accounts and for Surcharge against Patricia Pollak Weiss, filed by Petitioner Phyllis Pollak Berkett, and the Court having reviewed and evaluated the evidence and testimony presented, having considered the arguments of counsel, as well as the applicable case law, and being otherwise fully

advised in the premises, find and concludes as follows:

1. That a conflict of interest existed between Patricia Pollak Weiss individually and Patricia Pollak Weiss as Trustee of both the Albert Pollak Testamentary Trust and the Albert Pollak Inter Vivos Trust.

2. That in light of Patricia Pollak Weiss' conflict between her individual and fiduciary position as Trustee, any and all payments of trustee and/or attorneys fees sought on her behalf should have been by applications to the probate court (see: Shriner v. Dyer, 462 So. 2d 1122 (4th DCA 1984).

3. The preponderance of the evidence presented established that the trusts in question were substantially depleted of assets as a direct and proximate cause result of the improper actions taken by Patricia Pollak Weiss, as Trustee, including but not limited to, the continuation of litigation involving the estate and the trusts and the payment of fees and expenses relative to said litigation

WHEREFORE, it is herein ORDERED and ADJUDGED as follows:

1. The Amended Complaint (Petition) for Statements of Accounts and for Surcharge against Patricia Pollak Weiss is GRANTED with judgment to be entered against said Patricia Pollak Weiss in the sum of $1,693,181.73. [1]

1.The actual amount announced by the Court, according to the transcript of the October 15, 2001 evidentiary hearing, is $1,693,981.73, which amount is believed to have been due to either a scrivner's error or a mathematical error

A. The above surcharged amount is made up of the following component assessments:

1. Trustee fees incurred for the time period of June 1, 1983 through December 30, 1989 while Patricia Pollak Weiss served as Trustee, in the amount of $91,604.33;

2. Legal fees incurred on behalf of the trusts for the time period of June 1, 1983 through October 1, 2001, in the amount of $257,435.01, which fees were incurred as a direct and proximate result of the litigation engendered by Patricia Pollak Weiss as Trustee;

3. Legal fees paid by Phyllis Berkett individually on behalf of the trusts as a result of the litigation engendered by Patricia Pollak Weiss for the time period of June 1, 1983 through December 30, 1989, in the amount of $219,248.02;

4. Additional expenses incurred on behalf of and paid for from the trusts and associated with the resolution of the litigations engendered by Patricia Pollak Weiss, in the amount of $516,272.37;

5. Expenses advanced by Phyllis Berkett on behalf of the trusts associated with the resolution of the litigation engendered by Patricia Pollak Weiss, in the amount of $595,000.00; and

6. Accounting fees paid by or on behalf of the trusts incurred as a direct and proximate result of the litigation engendered by Patricia Pollak Weiss, or the resolution thereof, in the amount of $13,622.00.

For which sums let execution issue.

2. The Court further reserves jurisdiction to carry out any and all orders of this Court.

DONE and ENTERED in chambers at Miami-Dade County, Florida this 8th day of Feb., 2002.

/s/ Circuit Court Judge
Judge Maria M. Korvick

copies to:
Joel Hirschhorn, Esq.
Patricia Pollak Weiss, Esq.
Jonathan Oster, Esq.
Edward I. Golden, Esq.

OPINION AND ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL dated and filed November 6, 2002

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 2002

PATRICIA POLLAK WEISS, **
Appellant, ** CASE NO. 3D0-609

vs.

PHYLLIS POLLAK BERKETT, etc. ** Lower Tribunal
Appellee, ** Case Nos. 91-5143
92-4412

Opinion filed November 6, 2002

An appeal from the Circuit Court of Miami-Dade County, Maria M. Korvick, Judge

Patricia Pollak Weiss, in proper person

Hirschhorn & Bieber and Joel Hirschhorn, for appellee

Before FLETCHER and RAMIREZ, J.J., and NESBITT, Senior Judge

PER CURIAM.

Patricia Pollack Weiss appeals a surcharge judgment entered in connection with her trusteeship over several testamentary trusts. After a thorough review of the record and the applicable law, we find no reversible error in the proceedings below. We do, however, accepts appellee's concession of error with regard to the computation of the amount surcharged and remand for the sole purpose of correcting the judgment to reflect the amount of the surcharge as $1,676,377.73. In all other respects, the judgment is affirmed.

ORDER OF THE SUPREME COURT OF FLORIDA
dated and filed July 11, 2003

SUPREME COURT OF THE STATE OF FLORIDA

CASE No. SC03-377

Lower Tribunal No. 3D02-609

PATRICIA POLLAK WEISS, Petitioner(s)

vs.

PHYLLIS POLLAK BERKETT, etc., Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

WELLS, PARIENTE, LEWIS, QUINCE and CANTERO, JJ., concur.

A True Copy

Test:

/s/

Thomas D. Hall

Clerk, Supreme Court

ORDER OF THE SUPREME COURT OF FLORIDA
dated and filed March 14, 2003

SUPREME COURT OF FLORIDA

CASE No SC03-377

Lower Tribunal No. 3D02-609

PATRICIA POLLAK WEISS, Petitioner(s)

vs.

PHYLLIS POLLAK BERKETT, etc., Respondent(s)

The petition for writ of prohibition which this Court has treated as a motion to stay pending review, is hereby denied. See Fla. R. App. P. 9.310(A)-(B).

A True Copy Test:/s/ Thomas D. Hall, Clerk, Supreme Court

ORDER OF THE SUPREME COURT OF FLORIDA
dated and filed June 11, 2003

SUPREME COURT OF FLORIDA

CASE No. SC03-377

Lower Tribunal No. 3D02-609

PATRICIA POLLAK WEISS

vs.

PHYLLIS POLLAK BERKETT, etc.

Petitioner's "Motion for an Order that Relinquishes the Supreme Court of Florida's "Exclusive" Jurisdiction for the "Limited Purpose" of Permitting the Lower Tribunal's Successor Judge to Entertain and Determine Petitioner's Pending Judicial Administration Rule 2.160(h) Motion For Reconsideration and Petitioner's Anticipated Fla. R. Civ.P. 1.540 Motion for Relief from Judgment" is hereby denied as it is not required.The circuit court has jurisdiction to proceed.

A True Copy Test:/s/ Thomas D. Hall, Clerk, Supreme Court

WEISS v. BERKETT, 827 So. 2d 383 (Fla. 3d DCA 2002)

dated and filed October 9, 2002

Patricia Pollak WEISS, Petitioner

v.

PHYLLIS POLLAK BERKETT,

As the Successor Interim Trustee of the

Trusts Under the Will of Albert Pollak, Deceased,

and the Albert Pollak Inter Vivos Trusts, Respondent

No. 3D02-1806

District Court of Appeal of Florida,

Third District

October 9, 2002

A Writ of Prohibition to the Circuit Court for Miami-Dade County, Maria M. Korvick, Judge

Patricia Pollak Weiss, in proper person

Hirschhorn & Bieber and Joel Hisrchhorn, Coral Gables' Jacobs Chase Frick & Kelley and Jonathan C. Oster; and Susan E. Durre', South Miami, for respondent.

Linda Kelly Kearson, general Counsel, 11th Judicial Circuit of Florida, for Maria M. Korvick, Judge.

Before GERSTEN, FLETCHER and SHEVIN, J.J.

PER CURIAM.

We grant the petition for writ of prohibition. Here, as we found in *Pollak v. Berkett*, 816 So. 2d 1142 (Fla. 3d DCA 2002), the disqualification motion should have been granted. We are confident that issuance of the writ will be unnecessary.

Prohibition granted.

WEISS v. BERKETT, 785 So.2d 1248(Fla. 3d DCA 2001)

dated and filed June 6, 2001

Patricia Pollak WEISS, Appellant

v.

Phyllis Pollak BERKETT, et al., Appellees

No. 3D00-3066

District Court of Appeal of Florida,

Third District

June 6, 2001

Appeal from the Circuit Court for Miami-Dade County, Maria M. Korvick, Judge

Patricia Pollak Weiss (New York), in proper person

Hirschhorn & Bieber, P.A., and Joel Hirschhorn and Brian H. Bieber, Coral Gables, for appellees.

Before SCHWARTZ, C.J.,and JORGENSON and COPE, J.J.

PER CURIAM.

Patricia Pollack Weiss, the defendant below, appeals from an order requiring her to provide a detailed trust accounting for the year 1989. For the following reasons, we quash the order under review.

After Berkett, the plaintiff below, filed suit for discharge of Weiss, the defendant below, as trustee of several testamentary trusts, Weiss and Berkett entered into a settlement agreement. Under this 1989 open-court settlement agreement, Berkett was to assume the trusteeship immediately. Weiss was to transfer all the trust records within her possession to Berkett within ten days and to send releases to any attorneys or accountants with trust records,

putting them on notice that Weiss relinquished the right to access any documents. Weiss complied by transferring all the records to Berkett and sending the releases.

In 1991, Berkett filed suit against Weiss for, among other things, an accounting. After a trial, the court entered an order requiring Weiss to prepare a detailed accounting. This appeal follows.

We reverse because Berkett waived any right to an accounting in 1989. *See* Fla. Stat. 737.303(4)(d). The transcript of the 1989 settlement hearing, signed by both parties, shows that Berkett chose to take immediate possession of the documents rather than have Weiss prepare an accounting. At that time, Berkett clearly did not expect Weiss to perform an accounting, as the agreement required Weiss to transfer every scrap of paper within 10 days (although Berkett said she wanted the records sooner), rendering it impossible for Weiss to perform an accounting.

Even if Berkett had not effectively waved any right to an accounting, the order must be quashed because Berkett has already had her own accountant perform an accounting for the year 1989. To require Weiss to perform an accounting is, therefore, redundant, superfluous, and futile. *See, e.g. Plaza v. State*, 699 So. 2d 289 (Fla. 3d DCA 1997). In addition, because Weiss does not have possession of the records which she would need to perform an accounting, the lower court erroneously ordered Weiss to perform an impossible act. *See U-M Publishing, Inc. V. Home News Publishing Co.*, 279 So.2d 379 (Fla. 3d DCA 1973) (holding that the trial court erred in ordering defendant to do an impossible act).

The order under review is quashed and the cause is remanded for further proceedings not inconsistent with this opinion."

ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL DENYING REHEARING dated and filed August 17, 2005

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 2005
August 17, 2005

PATRICIA POLLAK WEISS, **

Appellant, ** CASE NO. 3D04-391

vs. CONSOLIDATED: 3D03-2652

PHYLLIS POLLAK BERKETT, etc. ** Lower Tribunal

Appellee, ** Case Nos. 91-5143

Upon consideration, appellant's motion for rehearing and motion for certification is hereby denied. GREEN and SHEPHERD, JJ, concur, COPE, C.J., specially concurs and states: On consideration of the motion for rehearing, it appears to me that the motion for relief from judgment under Florida Rule of Civil Procedure 1.540 was timely filed. See Glatstein v. City of Miami, 391 So.2d 297, 299 (Fla. 3d DCA 1980). On the merits, however, Rule 1.540 relief was correctly denied. I therefore join in denying rehearing and certification.

Appellant's motion for rehearing en banc is hereby denied.

ORDER OF FLORIDA THIRD DISTRICT COURT OF APPEAL dated and filed January 31, 2003

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2002

JANUARY 31, 2003

PATRICIA POLLAK WEISS, **

Appellant(s)/,Petitioner(s) ** CASE NO. 3D0-609

vs.

PHYLLIS POLLAK BERKETT, etc. ** Lower Tribunal

Appellee(s)/Respondent(s), ** Case Nos. 91-5143
92-4412

Upon consideration, appellee's motion for leave to file appellee's response to appellant's motion for rehearing and motion for rehearing en banc and motion for certification out of time is hereby denied.

Upon consideration, appellant's January 3, 2003 motion to supplement is hereby denied.

Upon consideration, appellant's motion for rehearing and motion for certification are hereby denied. FLETCHER and RAMIREZ, J.J., and NESBITT, Senior Judge, concur. Appellant's motion for rehearing is denied en banc.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statute §737.307 Limitations on proceedings against trustees after beneficiary receives account.
"Unless previously barred by adjudication, consent, or limitations, an action against a trustee for breach of trust is barred for any beneficiary who has received a final, annual, or periodic account or other statement fully disclosing the matter unless a proceeding to assert the claim is commenced within 6 months after receipt of the final, annual, or periodic account or statement. In any event, and notwithstanding lack of full disclosure, all claims against a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for his examination are barred as provided in chapter 95.11. A beneficiary has received a final, annual, or periodic account or statement if, being an adult, it is received by the beneficiary or if, being a minor, disabled person, or person who may take by virtue of the exercise or nonexercise of a power of appointment, it is received by the beneficiary's representative as described in §731.303."

"Florida Statute 737.402 Powers of trustees conferred by this part.--

(1) From the creation of the trust until final distribution of the assets from the trust, a trustee has the power to perform every act that a prudent trustee would perform for the purposes of the trust, without court authorization, including, but not limited to, the powers specified in subsections (2)...

.....

(2) ....

(y) To employ persons, including attorneys, auditors, investment advisers, or agents, even if they are the trustee or associated with the trustee, to advise or assist the trustee in the performance of his or her administrative duties; to act without independent investigation upon their recommendations; and, instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

(z) To prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his or her duties

....."

"Florida Statute 59.041 Harmless error; effect

No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed."

CONSTITUTIONAL ISSUES RAISED BELOW UNDER 8th AND 14th AMENDMENTS

Page 19 of "DEFENDANT/RESPONDENT PATRICIA POLLAK WEISS' ADDITIONAL VERIFIED FACTS AND MEMORANDUM OF LAW (1) IN FURTHER SUPPORT OF DEFENDANT/RESPONDENT'S MOTION TO VACATE SURCHARGE JUDGMENT AND ORDER GRANTING (MOTION FOR) PARTIAL SUMMARY AGAINST PATRICIA POLLAK WEISS PURSUANT TO FLA.R.CIV.P. 1.540, AND (2) IN REPLY TO PLAINTIFF/PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT/ RESPONDENT'S MOTION TO VACATE SURCHARGE JUDGMENT AND ORDER GRANTING (MOTION FOR) PARTIAL SUMMARY AGAINST PATRICIA POLLAK WEISS PURSUANT TO FLA.R.CIV.P. 1.540", served on September 1, 2003 states: "The overbroad surcharge appears to be a global fine that is not linked to any particular checks written during WEISS's trusteeship. That sort of fine offends both the Due Process Clause and the Excessive Fines Clause of the Constitution. In BMW v. Gore, 517 U.S. 599, 116 S.Ct. 1589 (1996) , the United States Supreme Court made clear that such excessive fines could not be tolerated under the Due Process Clause."

Page 26 of the same document states: "Wendt v. Horowitz, 822 So. 2d 1252 (Fla. 2002) and Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co., 752 So. 2d 582 (Fla. 2000) have reaffirmed that Florida courts must always examine whether a civil court defendant is afforded 'fair play and substantial justice' in a constitutional sense so as to satisfy the Due Process Clause. It is required under the Fifth and Fourteenth Amendments, where a non-resident is 'haled into' a Florida court for an Excessive Fine under the Eighth

Amendment that also offends BMW v. Gore, 517 U.S. 599 (1996) under the Fifth and Fourteenth.

Page 28 of the initial brief explains: WEISS raised numerous constitutional challenges to a "surcharge judgment" being violative of the Excessive Fines and Due Process Clauses because it judicially extended a civil statute of limitations to impose a grossly excessive civil punishment and haled WEISS into a Florida court long after the 6 month statute set in Fla. Stat. §737.307. Therefore, this Court should employ a reviewing standard more favorable.....Fla. Stat. §59.041 fails to distinguish between constitutional and non-constitutional errors. Because the errors appealed involve a deprivation of WEISS' constitutional rights, this Court should ensure Florida's enforcement of constitutional protections and place the burden of proof upon BERKETT, as the beneficiary of the multiple errors that resulted in a grossly excessive **civil punishment** (a "surcharge"), just as Fla. Stat. §924.33 (the harmless error rule in criminal cases) places the burden on the state to prove there was "no reasonable possibility" that the errors contributed to a **criminal punishment**. *See* State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986), adopting that test following Chapman v. California, 386 U.S. 18, 87 S.Ct. 4 (1967).

The Florida courts ignored these legal arguments which concerned the constitutional rights in question. The constitutional arguments concerning the Florida Supreme Court's denial of Petition's petition for discretionary review were not raised in that court as they could not have been raised because the issue had not yet arisen until the order denying discretionary review issued, and that order expressly stated that no motion for rehearing was permitted to be filed.